STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 18, 2000
v	No. 217633 Allegan Circuit Court
LON ALAN TODD, Defendant-Appellant.	LC No. 98-010937-FH

Before: Gage, P.J., and Meter and Owens, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of possession of marijuana with intent to deliver, MCL 333.7401(2)(d)(iii); MSA 14.15(7401)(2)(d)(iii), and possession of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v), and was sentenced to three years' probation, with the first sixty days to be served in the Allegan County Jail. Defendant appeals as of right. We affirm.

I

The first issue is whether the trial court erred by denying defendant's motion to suppress the evidence seized during the execution of the search warrant. Defendant argues that the affidavit in support of the search warrant failed to establish probable cause, the information contained in the affidavit was "stale," the scope of the search warrant was overbroad, and that the trial court improperly interpreted the word "quantity" to mean "substantial quantity." In fact, the gravamen of defendant's argument centers on the interpretation of the word "quantity."

Generally, we review a trial court's findings of fact regarding a motion to suppress evidence for clear error. *People v Burrell*, 417 Mich 439, 448-449; 339 NW2d 403 (1983). This Court, in *People v Echavarria*, 233 Mich App 356, 366-367; 592 NW2d 737 (1999), summarized:

> A search warrant affidavit prepared on the basis of information provided to the affiant by an unnamed person must provide sufficient facts from which a magistrate could find that the information supplied was based on personal knowledge and that either the unnamed person was credible or that the information was reliable. . . . When

> reviewing a magistrate's decision to issue a search warrant, this Court must evaluate the search warrant and underlying affidavit in a commonsense and realistic manner. This Court must then determine whether a reasonably cautious person could have concluded, under the totality of the circumstances, that there was a substantial basis for the magistrate's finding of probable cause. [Citations omitted.]

Put somewhat differently, the United States Supreme Court has stated that a magistrate must simply determine that "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v Gates*, 462 US 213, 238; 103 S Ct 2317; 76 L Ed 2d 527 (1983), quoting *Jones v United States*, 362 US 257, 271; 80 S Ct 725; 4 L Ed 2d 697 (1960). The reviewing court then assesses the magistrate's determination to ensure that there was a " 'substantial basis for . . . conclud[ing]' that a search would uncover evidence of wrongdoing." *Gates, supra* at 236.

Defendant first argues that the trial court erred by interpreting "quantity" to mean "substantial quantity," where the affidavit stated that the confidential informant observed "a quantity of marijuana" at defendant's residence. The word quantity, of course, can have different meanings depending on its context. *Random House Webster's College Dictionary* (1997) includes several different definitions for "quantity," including: "1. an indefinite or aggregate amount . . . 3. a considerable or great amount." To the extent that defendant suggests "quantity" could refer to one marijuana cigarette, we do not believe that is a fair interpretation of this word. Rather, in the absence of a modifying adjective, we believe that, in the present context, "quantity" is most appropriately defined as "considerable or great amount." At the very least, we do not believe that the trial court erred by recognizing that the magistrate could have applied this common-sense definition in its probable cause inquiry.

Defendant, however, contends that the trial court erred by considering the definition of "quantity" without limiting itself to the "four corners of the document." Defendant places particular reliance on our Supreme Court's decision in *People v Sloan*, 450 Mich 160, 168-169; 538 NW2d 380 (1995),[1] where it held that reviewing courts must ensure that the magistrate's decision was based on actual facts and not merely the affiant's conclusions. Nevertheless, we do not believe that interpreting the contextual meaning of a word contained in the affidavit goes beyond the "four corners of the document," and defendant cites no authority suggesting that the magistrate or trial court may not do so. Rather, it has repeatedly been held that affidavits must be interpreted in a "common-sense and realistic manner." *People v Russo*, 439 Mich 584, 604; 487 NW2d 698 (1992); *Echavarria, supra* at 366. Thus, we do not believe that interpretation of the word "quantity" required reliance on any conclusion of the affiant, nor did the ultimate finding of probable cause; rather, the magistrate's interpretation was based on a "common-sense and realistic" interpretation of the word "quantity" within the context of the search warrant affidavit.

Defendant further contends that the information contained in the affidavit was "stale." Our Supreme Court has held that "staleness" is a factor to consider when determining whether there was probable cause for a search. *Russo, supra* at 605. The Court held, however, that age is not the sole determinative factor, and that the "staleness" inquiry includes a consideration of the nature of the property to be seized as well as other factors. *Russo, supra* at 605-606, citing 2 LaFave, Search and

Seizure (2d ed), § 3.7(a), p 77 and quoting *Andresen v Maryland*, 24 Md App 128, 172; 331 A2d 78 (1975), aff'd 427 US 463; 96 S Ct 2737; 49 L Ed 2d 627 (1976). The ultimate determination to be made is whether, considering the totality of applicable factors, the property to be seized is likely to be present at the place specified in the search warrant application. *Russo, supra* at 605-606; *People v Stumpf*, 196 Mich App 218, 226; 492 NW2d 795 (1992).

The trial court concluded that no more than 82½ hours elapsed between the confidential informant's observation of the marijuana at defendant's residence and the execution of the search warrant. Defendant does not challenge this finding by the trial court. As stated above, we conclude that the affidavit supports the trial court's interpretation of the word "quantity" to mean "substantial quantity." Observation of a "quantity" (as defined above) of marijuana suggests either the existence of an on-going conspiracy, or at least, an amount for personal use sufficiently large enough not to be used up in a few days' time. *Andresen, supra* at 172. Moreover, the observation was made at defendant's home, not on the street, suggesting that the marijuana would still be at that location. *Id*. Accordingly, we are not convinced that a "quantity" of marijuana could dissipate within this time frame sufficient to render the confidential informant's observations "stale."

Next, defendant contends that the search warrant was "grossly overbroad" because it authorized a search for items related to drug trafficking based on facts alleging only the presence of marijuana at defendant's residence. Our Supreme Court has held, however, that evidence of a delivery of a controlled substance to a defendant's residence is sufficient to support a search for drug trafficking paraphernalia. *People v Landt*, 439 Mich 870; 475 NW2d 825 (1991). Although the instant matter does not involve evidence of a delivery of a controlled substance, the facts suggest that defendant was already in possession of the marijuana. At the very least, we interpret this decision to not require specific proof of a controlled substance transfer from defendant to a third party to support a probable cause finding for drug trafficking. Moreover, to the extent that the affidavit suggests a "quantity" of marijuana was observed at defendant's residence, this provides further support for the magistrate's finding of probable cause as to the drug trafficking paraphernalia.

Finally, from the testimony presented at trial, it appears that defendant directed the police to his bedroom closet and that was where the contraband and drugs were seized. The police would have been justified, under the "plain view" exception to the warrant requirement, in seizing readily apparent contraband from the closet even had such items not been listed in the search warrant. *Coolidge v New Hampshire*, 403 US 443; 91 S Ct 2022; 29 L Ed 2d 564 (1971); *People v Champion*, 452 Mich 92, 101-103; 549 NW2d 849 (1996). Accordingly, even if the search warrant was overbroad, defendant has failed to demonstrate that he is entitled to suppression of the cocaine, methamphetamine, scales, and money that was seized along with the marijuana. Therefore, we conclude that the trial court did not err by denying defendant's motion to suppress the evidence seized under any of defendant's individual grounds.

Turning to the combined effect of defendant's individual grounds to suppress the evidence, we must determine whether, under the totality of the circumstances, a reasonably cautious person could have concluded that there was a "substantial basis," or "a fair probability that the items will be found in a particular place," for the magistrate's finding of probable cause. *Russo, supra* at 604; *Echavarria*,

supra, at 366-367. In the instant matter, a reliable, confidential informant[2] stated that a "quantity" of marijuana was observed at defendant's residence within about 82½ hours preceding the execution of the search warrants. Consequently, notwithstanding defendant's arguments to the contrary, we conclude that there was indeed a "substantial basis" to conclude that there was a "fair probability" that the marijuana would still be present at defendant's home.

II

Next, defendant contends that the trial court erred by denying defendant's motion to compel disclosure of the confidential informant. Specifically, defendant argued that the informant must have observed defendant and the marijuana, that the informant would have to testify that he or she did not observe defendant actually delivering marijuana to anyone, and that this testimony would thus support defendant's claim that he did not intend to deliver the marijuana. Moreover, defendant doubted that the confidential informant existed because none of defendant's acquaintances acknowledged being the informant. Defendant contended that at the very least, a hearing in camera was required to determine whether the informant's identity should be compelled.

We review a trial court's decision to not compel disclosure of the identity of a confidential informant under a clearly erroneous standard. *People v Acosta*, 153 Mich App 504, 509; 396 NW2d 463 (1986) (citing MCR 2.613(C)).

In *People v Underwood*, 447 Mich 695; 526 NW2d 903 (1994), our Supreme Court held that "the most useful [procedural vehicle] for helping a trial judge to strike the appropriate balance between these competing interests is the in camera hearing." *Id.* at 706 (quoting *People v Stander*, 73 Mich App 617, 622-623; 251 NW2d 258 (1977)). The *Underwood* Court further held:

> Thus, where the government invokes the privilege in the face of a defense request for disclosure, and *where the accused is able to demonstrate a possible need for the informant's testimony,* the trial judge should require production of the informant and conduct a hearing in chambers, and out of the presence of the defendant. At this hearing the court will have an opportunity to examine the informant in order to determine whether he could offer any testimony helpful to the defense. [*Underwood, supra* at 706 (quoting *Stander, supra* at 622-623) (emphasis added).]

Thus, as noted by the trial court, the issue in the instant matter becomes whether defendant demonstrated a possible need for the informant's testimony.

The United States Supreme Court recognized the unfairness that can result to a defendant's case with an unlimited informer's privilege. *Roviaro v United States*, 353 US 53, 60-61; 77 S Ct 623; 1 L Ed 2d 639 (1957). In *Roviaro*, the confidential informant was the only other party to an illegal drug transaction with the defendant and thus was the only witness who could possibly testify on behalf of the defendant or contradict the testimony of the government witnesses. *Id.* at 64. The Supreme Court therefore concluded that, under the circumstances, the trial court erred by not compelling disclosure of the informant. *Id.* at 65.

In the instant matter, however, defendant argued that there were individuals at his residence who denied being the informant, suggesting that the informant might have been fabricated. Defendant's claim proceeds from the assumption that the informant, who sought confidentiality from the police, would have willingly revealed to defendant that he had informed on defendant to the police. We find defendant's underlying assumption tenuous. In any event, defendant was free to call any of these individuals as witnesses to rebut the prosecutor's circumstantial evidence of an intent to deliver marijuana. In other words, unlike *Roviaro*, there were additional witnesses to defendant's conduct and there was no evidence suggesting the uniqueness of the informant's testimony. To the extent that defendant narrowed the number of possible informants, defendant cites no authority suggesting that the prosecutor was required to disclose which one, if any, was the informant.

Moreover, defendant presented no evidence supporting his assertion that Deputy Gardiner fabricated the confidential informant or submitted a false affidavit. Along the same lines, there was no evidence presented supporting entrapment. Presumably, if defendant knew who he obtained the marijuana from, he could have interviewed or named that individual as a witness; in other words, confirming that individual as the confidential informant was still possible without dissolving the informant's privilege. As noted by the trial court, defendant has simply made the statement that the confidential informant might have information necessary to a defense, without supporting this assertion whatsoever. Thus, we believe that the facts and circumstances of this case do not warrant abrogation of the informant's privilege. We conclude that the trial court did not err by denying defendant's request for the prosecutor to reveal the identity of the confidential informant.

III

Finally, defendant challenges the sufficiency of the evidence supporting the trial court's conclusion regarding the "intent to deliver" element. Specifically, defendant has noted Deputy Gardiner's testimony that it was possible that: (i) a personal user of marijuana could purchase in greater quantity to benefit from a lower per-unit price; (ii) an individual could possess 256 grams of marijuana for personal use; and (iii) a personal user could own a triple-beam scale to measure the accuracy of purchases. In other words, defendant contends that Gardiner's concessions prevented a finding of intent to deliver beyond a reasonable doubt.

This Court has held that the "intent to deliver" element may be proven by circumstantial evidence, and may be inferred from the amount of a controlled substance possessed by the accused. *People v Wolfe*, 440 Mich 508, 524; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Abrego*, 72 Mich App 176, 181; 249 NW2d 345 (1976)). In *Abrego*, this Court deemed the evidence sufficient to support a possession with intent to deliver charge, rather than mere possession, where the defendant possessed enough heroin to produce only "35 to 46 hits." *Abrego, supra* at 182. This Court has also held that possessing almost four ounces of marijuana, divided into different types of packages, was sufficient to support an intent to deliver. *Wayne Co Prosecutor v Recorder's Court Judge*, 119 Mich App 159, 163; 326 NW2d 825 (1982).

In the instant matter, Deputy Gardiner testified that, in his experience, defendant possessed enough marijuana to make roughly 512 marijuana joints — more than ten times the units in *Abrego*. Furthermore, Gardiner testified that a typical purchase for personal use would be about twenty-eight grams. Gardiner also testified that defendant possessed a triple-beam scale that is commonly used by drug dealers to weigh narcotics and $2,900 in cash, and that both were found in the same closet as the marijuana. In light of the case law and viewing the evidence in a light most favorable to the prosecution, *Wolfe, supra* at 515, we conclude that sufficient evidence was presented to justify the trial court's finding that defendant possessed the requisite intent to deliver the marijuana beyond a reasonable doubt.

Affirmed.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Donald S. Owens

[1] This decision was overruled on other grounds by our Supreme Court in *People v Wager*, 460 Mich 118; 594 NW2d 487 (1999).

[2] Even where a search warrant affidavit is based on statements of an unnamed informant, the magistrate is only required to determine, under a totality of the circumstances, that the search warrant sets forth probable cause to believe that the items sought will be in the enumerated location. *Illinois v Gates, supra* at 230-239. Allegations in the affidavit that demonstrate the basis for the informant's knowledge and that show that the informant is credible or that his information is reliable will, when analyzed properly under a totality of the circumstances, support the magistrate's probable cause determination. *Id.* In this case, the informant told Deputy Gardiner that he had personally observed the quantity of marijuana (basis of knowledge) and Gardiner stated that the informant had previously provided evidence that led to the issuance of eight search warrants, the execution of which resulted in the recovery of "marijuana, methamphetamine, cocaine, LSD, and weapons" (credibility of the informant).